APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

No. 1:05-CR-149

[Filed August 14, 2006]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
CORNELL P. GUNTER	)
	)

MEMORANDUM

Defendant Cornell P. Gunter ("Defendant") filed a motion to suppress evidence collected during the search of his residence on September 28, 2005 (Court File No. 15) which was referred to United States Magistrate Judge William B. Mitchell Carter to conduct an evidentiary hearing if necessary and make a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and (C). On April 18, 2006, the magistrate judge filed a report and recommendation ("R&R") recommending Defendant's motion be denied (Court File No. 25).

Defendant filed an objection to the report and recommendation and requested a *de novo* hearing (Court File No. 26). Defendant contends there was an insufficient nexus between the alleged criminal activity and his residence to establish probable cause (*Id.*). He also argues the good faith exception cannot be applied here because no reasonably objective police officer could have relied on a warrant issued on the basis of this affidavit (*Id.*). After carefully considering both the filings of Defendant and the Government (Court File Nos. 15, 16, 22, 25, 26), the Court finds the magistrate judge's legal analysis to be correct under the relevant law.

I. Standard of Review

This Court must conduct a *de novo* review of those portions of the report and recommendation to which objection is made and may accept, reject, or modify, in whole or in part, the magistrate judge's findings or recommendations. 28 U.S.C. § 636(b)(1)(C).

II. Relevant Facts

On September 28, 2005, a warrant was issued by the Criminal Court, 10th Judicial District in McMinn County, Tennessee for the search of Defendant's residence at 1484 County Road 250 in Niota, Tennessee (Court File No. 15, ¶1). That same day, agents with the Tennessee Bureau of Investigation ("TBI") and the Tenth Judicial Drug Task Force ("DTF") executed this search warrant and searched Defendant's residence (Court File No. 22, p.2). The officers seized cocaine, large amounts of cash, and a gun from the house (*Id.*). In addition, drug

paraphernalia was discovered in the Defendant's Cadillac parked outside the residence (*Id.* at 4).

The search warrant was issued pursuant to an application and affidavit of TBI Special Agent Bryan Freeman (Court File No. 15, ¶ 1). The following facts were given in the affidavit and considered by the Criminal Court, 10th Judicial District, as justification for the search warrant:

Special Agent Freeman has been an employee of the TBI for approximately nine years (Court File No. 16-2, ¶ 1). Prior to his employment at TBI, he was an agent with DTF for two years (*Id.*). As a result of his extensive training and experience, Freeman is familiar with common operating patterns utilized by persons involved with illegal drug trafficking (*Id.*). One such operating pattern Special Agent Freeman is aware of is individuals often use their residences and the area and property surrounding their residences to conceal evidence of their illicit crimes (*Id.* at ¶¶ 1A-1C, 1L-1H).

In fall, 2003 Special Agent Freeman and other law enforcement officers began investigating a conspiracy of cocaine trafficking in McMinn County, Tennessee (*Id.* at ¶ 2). In September, 2005, Freeman spoke with a confidential source ("CS") who informed him he could potentially purchase cocaine from Defendant (*Id.* at ¶ 4). On September 22, 2005, Special Agent Freeman and other DTF agents met with the CS and observed him phone Defendant and make arrangements to purchase cocaine (*Id.* at ¶ 5). They provided the CS with a transmitting device and money to purchase the cocaine and proceeded to follow him to Harper Johnson

Road in Athens, Tennessee, where they listened and observed Defendant sell approximately two ounces of cocaine to the CS (*Id.* at ¶ 6).

On September 27, 2005, Special Agent Freeman and other DTF agents once again monitored the CS's phone call to Defendant, gave the CS a transmitting device and money with which to purchase the drugs, and followed him to the meeting place (*Id.* at ¶ 9). Concurrently, two other agents were monitoring Defendant's house and saw a dark-colored Cadillac driven by a black male, later identified as Defendant, enter the driveway (*Id.* at ¶ 10). The Cadillac remained at the residence for two to three minutes before leaving (*Id.*). The agents followed the Cadillac to Harper Johnson Road, Athens, Tennessee where Defendant met the CS (*Id.* at ¶ 12). Once more, the nearby agents observed and listened to the this meeting during which Defendant sold approximately two ounces of cocaine to the CS (*Id.*).

III. Analysis

Defendant asserts all evidence seized as a result of the search warrant was obtained in violation of his Fourth Amendment rights and should be suppressed (Court File No. 15).

A. Validity of Search Warrant/ Probable Cause

In order for a judge to issue a warrant, law enforcement officers must present sufficient evidence from which the judge can conclude that evidence will be found in a particular place. *United States v.*

Williams, 224 F.3d 530, 532 (6th Cir. 2000) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). To reach a conclusion, the totality of the circumstances must be examined in a "realistic and common sense fashion." *United States v. Van Shutters*, 163 F.3d 331 (6th Cir. 1998). There also must be a logical nexus between the place to be searched and the criminal activity. *United States v. Schultz*, 14 F.3d 1093, 1097 (6th Cir. 1994). In addition, if the evidence presented by the affiant is mainly obtained from a confidential source, the affiant must provide the issuing judge with enough information that he can independently conclude the CS is reliable. *United States v. McCraven*, 401 F.3d 693, 697 (6th Cir. 2005).

The Supreme Court has held "probable cause requires only a probability or substantial chance of criminal activity." *Gates*, 462 U.S. at 243-44 n. 14. A "practical nontechnical" probability incriminating evidence is involved is sufficient. *See Brown v. Texas*, 460 U.S. 730, 742 (1983).

1. Nexus between Criminal Activity and Defendant's residence

Defendant argues there was no nexus between the drug deals and his residence and, therefore, there was no probable cause to issue the search warrant. He points to the fact the CS gave no information as to the house itself or the presence of drugs at the residence, nor was Special Agent Freeman present to personally observe Defendant's car in the house's driveway *(Id.)*.

The circumstances surrounding the issuance of the search warrant permitting search of Defendant's

residence are comparable to the circumstances described in *United States v. Murphy*, 241 F.3d 447 (6th Cir. 2001). In *Murphy*, law enforcement officers observed the defendant leaving a motel room, meeting a CS outside the room to sell crack, and returning to his motel room. *Id.* at 457. The court determined these observations were sufficient to establish probable cause for the issuance of a warrant to search the motel room, regardless of the fact only one transaction was observed and this transaction did not occur in the motel room. *Id.* at 458.

While Defendant was not observed entering his house before the drug transaction, which would have clearly shown a connection between the residence and the criminal activity, the affiant included in the affidavit information which established the Niota residence as Defendant's and Defendant's presence at the residence prior to the drug purchase by the CS (Court File No. 16-2, ¶¶ 7, 10). Although the affiant did not personally observe Defendant at his residence, two other agents did (*Id.*). It is permissible for the affiant officer to rely on another officer's observations in an affidavit supporting a search warrant. *See United States v. Woods*, 544 F.2d 242, 260 (6th Cir. 1976) (noting for assessing whether probable cause exists, appeals court "mutually imputes the knowledge of all the agents working together on the scene and in communication with each other"); accord *United States v. Rodriguez-Suazo*, 346 F.3d 637, 650 (6th Cir. 2003).

Similar to the facts in Defendant's case is *United States v. Blair*, which held, along with information provided from reliable witnesses, the affiant's opinion, based on his extensive experience, that evidence would

be found in the defendant's residence was sufficient to establish probable cause for the issuance of a search warrant. 214 F.3d 690, 696 (6th Cir. 2000). "In the case of drug dealers, evidence is likely to be found where the drug dealers live." *United States v. Jones*, 159 F.3d 969, 974 (6th Cir. 1998). In addition, the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") has held in a series of cases an observation of drug trafficking outside the dealer's home can provide probable cause to search the dealer's house. *See United States v. Miggins*, 302 F.3d 384, 383-84 (6th Cir. 2002); *Jones*, 159 F.3d at 974; *United States v. Caicedo*, 85 F.3d 1184, 1193 (6th Cir. 1996).

Defendant relies upon *United States v. Frazier* which he contends contravenes this line of Sixth Circuit cases. *United States v. Frazier*, 423 F.3d 526, 531 (6th Cir. 2005). In *Frazier*, an affidavit issued in circumstances somewhat similar to the Defendant's was determined to lack probable cause. *Id.* There, the affidavit detailed a drug conspiracy, included a cooperating informant's statement he had observed drug dealing out of the residence at issue, and described drug transactions but did not indicate those transactions actually were controlled buys caught on tape. *Id.* at 529-31. The court concluded review of sufficiency of the evidence was limited to the information presented in "the four corners of the affidavit." *Id.* When assessing the affidavit, the court determined because the affidavit was based almost solely on the uncorroborated testimony of an unproven confidential informant who never actually witnessed criminal activity, the suspicion the defendant is a drug dealer alone was not sufficient to tie the criminal activity to the defendant's residence. *Id.* at 533.

However, the circumstances in *Frazier* are clearly distinguishable from those here because Special Agent Freeman's affidavit included information the drug deals were observed and heard by both the CS and the agents. *See Id.*, (Court File No. 16-2, ¶¶ 5, 6, 9, 11-12). Unlike *Frazier*, there is more to Special Agent Freeman's affidavit than an uncorroborated allegation Defendant is a drug dealer. *See Id.*

"That defendant has pointed out specific factual details that the task force agents could have provided in the affidavit to the magistrate does not negate a finding of probable cause; this Court does not review the sufficiency of an affidavit through such a lens." *Murphy*, 241 F.3d at 458. The Court will **ACCEPT** and **ADOPT** the magistrate judge's analysis on this point and conclude the fact the drug deal observed did not occur in the defendant's home does not require finding an insufficient nexus between the defendant's house and his criminal activity.

2. Reliability of the Informant

In this case, Special Agent Freeman did not give the judge who issued the warrant any information about the CS's reliability (Court File No. 15). There are two factors which are critical to the determination a CS's information provides a substantial basis for finding probable cause: 1) an explicit first-hand account of the wrongdoing, and 2) corroboration of the information by independent investigation. *Jones*, 159 F.3d at 975 (citing *United States v. Wright*, 16 F.3d 1429, 1438 (6th Cir. 1994). In the absence of indicia of the reliability of the CS's statements, the affidavit

must contain substantial independent police support. *Frazier*, 423 F.3d at 532.

In *United States v. Coffee*, police corroboration was found to override the lack of proof of the CS's reliability merely because the officer observed the CS enter and leave the premises at which the drugs were obtained and was shown the drugs immediately after the CS departed the premises. *United States v. Coffee*, 434 F.3d 887 (6th Cir. 2006). The observation by the officer was sufficient even though the affidavit contained no assertions of the CS's reliability. *Id.* Special Agent Freeman's affidavit provided even more independent corroboration as the agents directly observed and heard the transaction (Court File No. 16-2, ¶¶ 5, 6, 9, 11-12). In addition, Special Agent Freeman gave a detailed account of the transactions and the process undergone in his affidavit. (*Id.*)

It is clear the affidavit showed substantial independent police investigation and evidence Defendant was involved in drug trafficking. Although the agents did not know whether the CS was reliable when he first contacted them and Special Agent Freeman made no statement about past experiences which establish reliability, further dealings with the CS and careful first-hand observation of him justified belief in the information provided.

Once again, Defendant cites *Frazier* in support of his argument. *See Frazier*, 423 F.3d at 530. However, unlike Special Agent Freeman's affidavit, the *Frazier* affidavit made no reference that the buys presented as evidence of probable cause were controlled buys caught on tape. *Id.* "The affidavit is judged on what it does

contain, not on what it lacks or on what a critic might say should be added." *United States v. Allen*, 2 11 F.3d 970, 975 (6th Cir. 2000). Special Agent Freeman's first hand observation of the drug deals allowed the magistrate judge to find probable cause, regardless of the lack of proof of CS's reliability. The Court finds the magistrate judge's determination the information from the CS in the affidavit was reliable was supported by relevant law and will **ACCEPT** and **ADOPT** the magistrate judge's finding of probable cause.

B. Good Faith Exception

Defendant claims that without a valid search warrant, the evidence cannot be admitted without violating the Fourth Amendment. The Court will address this objection although it finds the search warrant to be valid.

The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands since the wrong condemned by the amendment is "fully accomplished" by the illegal search and seizure in itself. *United States v. Leon*, 468 U.S. 897, 906 (1984) (citing *United States v. Calandra*, 414 U.S. 228, 354 (1974)). Cases have recognized that excluding all evidence procured in violation of the Fourth Amendment would "impede unacceptably the truth finding function of judge and jury." *Id.* at 907 (quoting *United States v. Payner*, 447 U.S. 727, 734 (1980)). Consequently, evidence obtained by an invalid search warrant that officers executed in good faith is admissible. *Leon*, 468 U.S. at 897.

Accordingly, even if the warrant were determined invalid, the Court can determine whether the evidence should still be admitted under the good faith exception established in *Leon*. *Id.* Under this test "the relevant question is whether the officer reasonably believed that the warrant was properly issued, not whether the probable cause existed in fact." *United States v. Laughton*, 409 F.3d 744, 752 (6th Cir. 2005) (quoting *United States v. Carpenter*, 360 F.3d 591, 595 (6th Cir. 2004). Leon enumerates four situations in which the officer's reliance on a search warrant could not be presumed reasonable:

> 1) When the warrant is issued on the basis of an affidavit that the affiant knows (or is reckless in not knowing) is false, 2) when the magistrate is not neutral and detached and serves merely as a rubber stamp for the police, 3) when the affidavit does not provide substantial basis for determining probable cause, and 4) when the officer has no reasonable ground for believing the warrant was properly issued.

Leon, 468 U.S. at 913, 923.

The legal issue brought to the attention of this Court is whether the warrant was so deficient that the officers conducting the search had no reasonable grounds for believing the warrant was properly issued. In *United States v. Shultz*, the affiant officer had not made any connection between the bank he searched and criminal activity that was the focus of the search. *United States v. Shultz*, F.3d 1093, 1097-98 (6th Cir. 1994). However, he suspected, based on his training and experience, evidence of the crime would be found

in the bank's safety deposit boxes. *Id.* Because the officer had undertaken a thorough investigation and had significant training and experience, the affidavit was "not so lacking" in indicia of probable cause as to render good-faith reliance unreasonable. *Id.* It has been held courts may take into account "the experience and expertise of law enforcement agents who observed the defendant's activity." *United States v. Valencia*, 24 F.3d 1106, 1108 (9th Cir. 1994).

Defendant's case is similar. Special Agent Freeman detailed his extensive experience and resulting knowledge in the affidavit (Court File No. 16-2, ¶ 1). He stated that he both watched and listened while the drug transactions between the Defendant and the CS took place (*Id.* at ¶¶ 5, 6, 9, 11-12). In addition, the Sixth Circuit has held it is appropriate to consider facts the agent knew which were not included in the warrant when assessing the reasonableness of his reliance. *Frazier*, 423 F.3d at 531. Whether or not the affidavit contained the appropriate information to justify the issuance of a search warrant, Special Agent Freeman's knowledge of the criminal activity and the habits of drug dealers justifies his determination of the validity of the search warrant. Consequently, the officers who conducted the search reasonably relied on the affidavit's legitimacy.

C. Request for Evidentiary Hearing

Because Defendant fails to state any misrepresented facts or supply evidence to show that facts were fabricated or recklessly disregarded, the court will **ACCEPT** and **ADOPT** the magistrate

judge's finding there is no entitlement to an evidentiary hearing.

IV. Conclusion

For the reasons stated above, after carefully reviewing the documents presented to the magistrate judge, the Court has determined the magistrate judge's legal analysis is correct under the relevant law. Following those findings, the Court will **ACCEPT** and **ADOPT** the magistrate's determination evidence found during a search of Defendant's residence on September 28, 2005 need not be suppressed.

An Order shall enter.

/s/
CURTIS L. COLLIER
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

No. 1:05-CR-149

[Filed August 14, 2006]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
CORNELL P. GUNTER	)
	)

ORDER

For the reasons set forth in the accompanying memorandum, it is **ORDERED** the Court **ACCEPTS** and **ADOPTS** the magistrate judge's report and recommendation (Court File No. 25) pursuant to 28 U.S.C. § 636(b)(1)(C) and Defendant's motion to suppress (Court File No. 15) is hereby **DENIED**.

SO ORDERED.

ENTER:

/s/
CURTIS L. COLLIER
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-5271

[Filed February 20, 2008]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
CORNELL P. GUNTER,	)
	)
Defendant-Appellant.	)
	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

BEFORE: SILER, CLAY and COOK, Circuit Judges.

CLAY, Circuit Judge. Defendant Cornell P. Gunter appeals his conviction, under 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), for possession with intent to distribute more than five grams of crack cocaine, and his conviction, under 18 U.S.C. § 924(c)(1)(B)(i), for possession of short-barreled shotgun in furtherance of

a drug trafficking crime. Specifically, Defendant argues that a warrant authorizing a search of his residence was not supported by probable cause. Because the affidavit describes a thorough investigation of Defendant, sufficient to establish probable cause to search his home, we **AFFIRM** Defendant's conviction.

STATEMENT OF FACTS

While conducting an investigation of Defendant Cornell Gunter, Tennessee law enforcement officers spoke with a confidential informant, who told them that he could potentially purchase cocaine from Defendant; and on September 22, 2005, the informant placed a call to Defendant to arrange a purchase. Agents of the Tennessee Bureau of Investigation ("TBI") monitored this call as the informant arranged to meet with Defendant later that day.

Under the supervision of the TBI, the informant made a controlled purchase of cocaine from Defendant. Prior to the purchase, agents searched the informant's person and vehicle to be certain he was not carrying any controlled substances. The agents then provided the informant with a covert transmitter and listened as the informant purchased approximately two ounces of cocaine from Defendant. Upon completion of the transaction, the informant turned this cocaine over to the agents.

Four days later, a TBI agent conducted a driver's license and vehicle registration inquiry on Defendant. This inquiry revealed Defendant's address in Niota,

Tennessee, and indicated that he owned several vehicles, including a Dodge RT and two Cadillacs.

On September 27, 2005, the TBI arranged another controlled purchase utilizing a confidential informant. While TBI agents were surveilling the Niota residence, the informant called Defendant to arrange the cocaine purchase. TBI agents monitored this call as Defendant told the informant that he was traveling, but would meet the informant in nearby Athens, Tennessee. Around the same time as this phone call, the agents watching Defendant's Niota residence observed a green Cadillac, driven by Defendant, arriving at that residence. The Cadillac remained at the residence for two to three minutes. TBI agents then followed the Cadillac as it stopped at another residence, and eventually traveled to the site of the controlled purchase. Like the first purchase, this controlled purchase was also monitored via transmitter by the TBI.

The next day, TBI Special Agent Bryan Freeman sought a warrant to search Defendant's residence for drugs, evidence of drug transactions and firearms. In addition to setting out the above facts in an affidavit accompanying the warrant application, Agent Freeman also described his significant experience in narcotics investigations, including over 100 investigations into drug trafficking, and stated that in his experience "individuals involved in drug trafficking frequently conceal, in their residence . . . caches of illicit drugs, large amounts of Unites [sic] States currency and/or other illicit proceedings of drug transactions, as well as records of drug transactions." (J.A. 34.) A photo of Defendant's residence was also

included in the affidavit to indicate the premises to be searched. Based on this affidavit, a Tennessee state judge issued a warrant to search Defendant's home. The ensuing search uncovered narcotics, cash and firearms, as well as drug paraphernalia in a Cadillac parked outside the residence.

DISCUSSION

Standard of Review

When reviewing a denial of a motion to suppress evidence, we review the district court's findings of fact for clear error and its conclusions of law *de novo*. *United States v. Jones*, 159 F.3d 969, 974 (6th Cir. 1998). In reviewing the decision of the magistrate issuing the search warrant, however, "we consider the evidence that the issuing magistrate had before him only 'to ensure that [he] ha[d] a substantial basis . . . for concluding that probable cause existed.'" *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983)).

Analysis

A warrant to search a residence may not issue except "upon probable cause, supported by Oath or affirmation." U.S. Const. amend. IV. To secure a search warrant, law enforcement must present a neutral magistrate "evidence from which the magistrate judge can conclude from the totality of the circumstances, 'including the 'veracity' and 'basis' of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *United States v. Williams*, 224 F.3d 530, 532 (6th Cir. 2000)

(quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Defendant alleges that the warrant affidavit in this case failed to establish probable cause because it failed to establish the reliability of the confidential informants' statements to police. Additionally, Defendant claims that the affidavit did not demonstrate a sufficient nexus between his drug trafficking and his residence to allow a search of that residence. We disagree.

A. The Reliability of the Confidential Informants

When, as here, a warrant affidavit provides no indicia of an informant's reliability, "courts insist that the affidavit contain substantial independent police corroboration." *United States v. Frazier*, 423 F.3d 526, 532 (6th Cir. 2005). Such independent corroboration may be established, however, by a police monitored, controlled purchase, such as the two which occurred in this case.

In *United States v. Coffee*, 434 F.3d 887 (6th Cir. 2006), this Court considered a similar case involving a confidential informant and a controlled purchase. The police in that case were told by an informant that he had purchased drugs from the *Coffee* defendant. *Id.* at 893. Based on that information, the police executed a controlled purchase similar to the one in the instant case. The informant was searched and made to wear a transmitter. *Id.* at 891. Police then monitored via the transmitter a conversation between the informant and the *Coffee* defendant, and their ensuing drug transaction. *Id.* Afterwards, police confiscated the drugs from the informant. *Id.* Based on this controlled purchase, we concluded that the informant's reliability

in *Coffee* was sufficiently corroborated, and thus rejected the defendant's claim that the warrant affidavit did not demonstrate probable cause. *Id.* at 894-95.

In the instant case, the TBI conducted not just one but two controlled purchases, using similar procedures to those used by the police in *Coffee*. If one such purchase was sufficient to corroborate an informant's statements in *Coffee*, then two purchases will more than suffice in the instant case. Accordingly, we hold that the warrant affidavit was not deficient for failing to establish the reliability of an informant.

B. The Nexus Between Defendant's Drug Trafficking and His Residence

Defendant next argues that, as the warrant affidavit only described drug sales outside his residence, it failed to establish a sufficient nexus between his illegal activity and his residence to allow a search of that residence. *See Frazier*, 423 F.3d at 532 ("There must be a 'nexus between the place to be searched and the evidence to be sought.'" (quoting *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004)). To establish such a nexus, a warrant application must show more than just that "the owner of the property is suspected of crime," but instead must establish "that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978). The mere fact that someone is a drug dealer is not alone sufficient to establish probable cause to search their home. *See Frazier*, 423 F.3d at 533.

Defendant argues that the warrant affidavit failed to establish a nexus between his residence and his drug trafficking because the confidential informant "provided no reliable information to establish a nexus and the facts fail to establish any such nexus as well." (Plaintiffs Br. at 17.) As the district court correctly noted, the best case for Defendant's position is this Court's decision in *Frazier*. *Frazier* involved a federal investigation of a drug conspiracy involving about 25 people. 423 F.3d at 530. Law enforcement agents learned that the *Frazier* defendant was involved in drug trafficking through confidential informants, who also informed them that the defendant was selling drugs from his home. Although the agents conducted several controlled purchases to establish the reliability of their informants, they neglected to mention in their affidavit accompanying the application for a warrant that these purchases were recorded via transmitter. *Id.* Lacking such corroboration of the informant's reliability, we held that when "the warrant affidavit is based almost exclusively on the uncorroborated testimony of unproven confidential informants . . . the allegation that the defendant is a drug dealer, without more, is insufficient to tie the alleged criminal activity to the defendant's residence." *Id.* at 533.

Frazier, however, is distinguishable from previous Sixth Circuit cases which upheld a search of a drug dealer's residence even though police observed no illegal activity at that residence. In *United States v. Miggins*, 302 F.3d 384 (6th Cir. 2002), for example, police arrested one member of a drug conspiracy when he signed for a package under the assumed name "Darnel Smith." *Id.* at 393. The package was addressed to "Tommy Lee," and the sender was "Keith Jackson,"

both assumed names of his co-conspirators. *Id.* In a search pursuant to their arrest of the so-called "Darnel Smith," police discovered a piece of paper which listed all three assumed names along with an address, which turned out to be the defendant's residence. Noting the discovery of this address along with aliases associated with the drug conspiracy, we held that police had probable cause to search the defendant's residence. *Id.*

Similarly, in *United States v. Caicedo*, 85 F.3d 1184 (6th Cir. 1996), we upheld a warrant authorizing a search of a residence despite only a limited connection between the residence and drug related activity. The *Caicedo* defendant was arrested while traveling with a friend who was carrying cocaine in his backpack. *Id.* at 1193. While he was being questioned by police, the defendant lied about his address. *Id.* Given this lie, we held that a warrant affidavit sworn by an experienced narcotics officer, which stated that "the reason for hiding the correct residence *could be* that further evidence *may be* located at this location which *could be* used against Ryan in this particular investigation," established a sufficient nexus between the defendant and his residence to allow a search of that residence. *Id.* (emphasis in original).

Reading *Frazier, Miggins* and *Caicedo* together, this Court's precedents establish that a nexus exists between a known drug dealer's criminal activity and the dealer's residence when some reliable evidence exists connecting the criminal activity with the residence. *See, e.g., Miggins*, 302 F.3d at 393; *Caicedo*, 85 F.3d at 1193. When, however, the only evidence of a connection between illegal activity and the residence is unreliable, such as uncorroborated statements by a

confidential informant, then a warrant may not issue allowing the search of the residence. *Frazier*, 423 F.3d at 533.

Applying this framework to the instant case, we conclude that the instant warrant affidavit described sufficient facts to establish a nexus between Defendant's drug trafficking and his residence. The warrant affidavit described the investigating law enforcement agent's significant experience in narcotics investigations–including over 100 investigations into drug trafficking–and stated that in that agent's experience drug dealers typically keep evidence of their crime in their residence. Moreover, unlike *Frazier*, where the warrant affidavit relied entirely on statements of confidential informants to establish a connection between the defendant and his residence, the instant affidavit describes an incident where law enforcement agents observed Defendant visiting his residence right before he traveled to the site of a drug sale. This visit provided a neutral magistrate with a substantial basis to conclude that Defendant may have stopped at his residence to pick up some of his merchandise before meeting his customer at another Location. This evidence, combined with the affiant's statements that he has significant experience in narcotics investigations, is sufficient to establish a nexus between Defendant's illegal activities and his residence. *See Caicedo*, 85 F.3d at 1193. Accordingly, we affirm the decision of the district court admitting evidence seized in the search of Defendant's residence.

Because we hold that probable cause supported the warrant, we do not address Defendant's challenge to the district court's alternative grounds for denying

suppression–the good-faith exception to the probable cause requirement.

CONCLUSION

The warrant to search Defendant's home was issued upon probable cause. The warrant affidavit described sufficient evidence to corroborate statements by confidential informants and the affidavit showed a nexus between Defendant's illegal activities and his residence. Accordingly, we **AFFIRM** Defendant's conviction.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

Case No. 1:05-cr-149

[Filed April 18, 2006]

UNITED STATES OF AMERICA	)
	)
vs.	)
	)
CORNELL P. GUNTER, also known as PERRY GUNTER	)
	)

REPORT AND RECOMMENDATION

I. Introduction

Defendant Cornell Gunter's Motion to Suppress (Doc. 15) is pending before the undersigned Magistrate Judge having been referred by the District Court for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). Defendant seeks to suppress evidence found during a search of his residence on September 28, 2005, pursuant to a search warrant. Defendant also requests an evidentiary hearing "so a record can be developed to determine the constitutionality of the search" (Defendant's Mot. to Suppress at 2). For the

reasons set forth, the undersigned Magistrate Judge RECOMMENDS defendant's motion to suppress be DENIED.

II. Relevant Facts

On September 28, 2005, the members of the Tennessee Bureau of Investigation (TBI), the 10th Judicial Drug Task Force, and the McMinn County Sheriff's Office executed a search warrant for 1484 County Road 250 in Niota, Tennessee. Narcotics, cash, and firearms were found in the house. Drug paraphernalia was found in a 1998 Cadillac DeVille outside the residence. Prior to execution of the search warrant, TBI Special Agent Brian Freeman prepared and submitted on September 28, 2005, an affidavit to McMinn County Criminal Court Judge Bebb to obtain the search warrant for defendant's residence. The warrant affidavit provides a great deal of information including the following especially relevant to this motion:

Agent Freeman has been employed by the TBI for nine years in narcotics investigations. (Freeman Affidavit at ¶ 1.) Prior to his employment with the TBI, he was employed by the 10th Judicial Drug Task Force. *Id.* He has conducted over 100 investigations into drug trafficking, many of which have lead to arrests and convictions. *Id.* He is familiar with the operations, terminology and patterns of behavior of persons involved in trafficking illegal drugs. *Id.* Individuals involved in drug trafficking often use their residences as places to store illegal drugs, cash, firearms, drug paraphernalia, and drug trafficking paraphernalia. *Id.* at ¶¶ 1A- 1C, 1L-1H.

In September 2005, a confidential source (CS) told Freeman that he/she might be able to purchase drugs from the defendant. *Id.* at ¶ 4. On September 22, 2005, Freeman and other agents met with the CS and monitored the CS as he/she telephoned the defendant and arranged to purchase cocaine from the defendant. *Id.* at ¶ 5. That same day, the CS made a controlled buy of cocaine from the defendant. *Id.* Immediately prior to the buy, agents checked the CS's person and his/her vehicle to make sure he/she had no drugs. *Id.* at ¶ 6. The CS was given money to purchase the drugs. *Id.* Agents followed the CS to Harper Johnson Road in Athens, Tennessee where the CS purchased two ounces of cocaine from the defendant. *Id.* The CS was wearing a wire at the time, and agents listened to the transaction as it occurred via the covert transmitter. *Id.* After the buy, Freeman and another agent met with the CS at a debriefing location, and the CS released two ounces of cocaine to them. *Id.* The agents again searched the CS' person and vehicle for drugs and found none. *Id.* As of September 26, 2005, the Tennessee Department of Safety records showed the defendant's address as 1484 County Road 250, Niota, Tennessee. *Id.* ¶ 7. Two Cadillacs as well as other vehicles were registered to defendant at this same address. *Id.* at ¶ 8.

On September 27, 2005, Freeman conducted another controlled buy with a confidential source (CS) and the defendant. *Id.* at ¶¶ 9-12. Agents searched the CS' person and vehicle and found no drugs. *Id.* at ¶ 9. Agents gave the CS money to buy drugs and outfitted the CS with a wire. Id. ¶ 9. As agents monitored the CS with the wire, the CS telephoned the defendant and ordered a quantity of cocaine. *Id.* Defendant told

the CS he would call him/her back. *Id.* Thirty minutes later, defendant called and arranged to meet the CS in Athens, Tennessee in about fifteen minutes. *Id.* Freeman followed the CS and maintained audio and visual surveillance of the CS as he/she drove to meet the defendant. *Id.* at ¶ 9-10.

At the same time Freeman was monitoring the telephone contact between the CS and the defendant, other agents were watching 1484 County Road 250 in Niota, Tennessee. *Id.* ¶ at 10. These agents observed a black male, later identified as the defendant, arrive at the residence in a green Cadillac, remain for two to three minutes in his car outside the residence and then leave. *Id.* Other agents followed the Cadillac to Harper Johnson Road in Athens, Tennessee where Defendant eventually met with the CS. *Id.* at ¶¶ 10-12. Freeman and another agent monitored the CS' meeting with the defendant during which the CS purchased two ounces of cocaine. *Id.* at ¶ 12. After the purchase, Freeman followed the CS to a debriefing location where the CS released two ounces of cocaine. Freeman searched the CS' person and vehicle and no other drugs were found. *Id.*

III. Analysis

A. The Reliability of Freeman's Sources of information

Defendant argues the affidavit used to obtain the search warrant for his residence failed to establish probable cause because the veracity and reliability of the confidential sources mentioned in the affidavit were not demonstrated. The Fourth Amendment provides "no warrant shall issue but upon probable cause, supported by oath or affirmation ...." *U.S. Const. amend IV.* To establish probable cause to justify a search warrant, an affidavit must set forth facts which indicate "a fair probability exists that evidence of a crime will be located on the premises of the proposed search." *United States v. Frazier*, 423 F.3d 526, 531 (6th Cir. 2005) (internal citations omitted); *United States v. Jenkins*, 396 F.3d 751, 760 (6th Cir. 2005). The Court must consider the totality of the circumstances as set out in the four corners of the affidavit. *Illinois v. Gates*, 462 U.S. 213, 230 (1983) (totality of the circumstances standard); *Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560, 565 n. 8 (1971) (Court limited to review of affidavit itself); *Frazier*, 423 F.3d at 531. Where an affidavit relies upon hearsay information from a confidential informant to supply probable cause, "a court must consider the veracity, reliability, and the basis of knowledge of that information as part of the totality of the circumstances for evaluating the impact of the information." *Frazier*, 423 F.3d at 532 (quoting *United States v. Helton*, 314 F.3d 812, 819 (6th Cir. 2003)). Independent police corroboration of a confidential informant's story is not necessarily required to support probable cause, but

where the affidavit lacks indicia of the informant's reliability, "courts insist that the affidavit contain substantial independent police corroboration." *Frazier*, 423 F.3d at 532; *see also, United States v. McCraven*, 401 F.3d 693, 698 (6th Cir. 2005); *United States v. Woosley*, 361 F.3d 924, 927 (6th Cir. 2004); *United States v. Allen*, 211 F.3d 970, 976 (6th Cir.) (en banc), *cert. denied*, 531 U.S. 907 (2000).

Special Agent Freeman's affidavit provides no statement about past experiences with the CS's regarding their reliability or veracity. For example, affidavits will often contain some statement from the affiant that he has known the CS for a certain period of time and that during that time the CS has provided information of illegal drug trafficking which has led to the arrest and conviction of individuals for drug related charges. As the instant affidavit contains no such averment, independent police corroboration of the CS's information is necessary in order to rely upon the CS's information to establish probable cause.

Freeman's affidavit carefully details a controlled buy for each confidential source.[1] Agents searched the CS and his/her car for drugs before each controlled buy. Agents listened to the controlled buys over a wire transmitter carried by each CS, and, at least in the second buy, the defendant and the CS were observed arriving at the meeting place for the buy. After each buy, the CS turned over the contraband purchased and was again searched.

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[1] I cannot discern from the affidavit if the CS's mentioned are two people or one.

The Sixth Circuit's recent decision in *United States v. Coffee*, 434 F.3d 887 (6th Cir. 2005) is directly on point on this issue. In *Coffee*, the warrant affidavit contained no averments from the affiant that he knew the confidential source to be reliable based on prior contacts. However, the affiant detailed a controlled buy using the confidential source, and the Sixth Circuit found this information sufficient to establish the confidential source's reliability and veracity:

> Here, the details of the controlled purchase, and its connection to 26868 Penn, were spelled out in the affidavit. Officer Adams indicated that the CI [confidential informant] "has made several purchases from" 26868 Penn. He further described the controlled purchase that he organized to corroborate the informant's information. The CI's basis of knowledge was his direct purchase of narcotics from defendant; the purchase was controlled and witnessed by Officer Adams, who searched the CI for money or contraband, provided the CI with pre-recorded funds, observed the CI enter and exit defendant's house, and then observed and tested the crack cocaine the CI purchased from defendant. Under the totality of the circumstances, Officer Adams' affidavit adequately corroborated the CI's information in this case ...

Coffee, 434 F.3d at 894. In the instant case, the corroborating facts set forth in the affidavit about the controlled buys are even stronger than those in *Coffee*. In this case, the controlled buys were actually heard by police as they occurred thereby further bolstering the

CS(s)' reliability. Consequently, I conclude the affidavit contains sufficient independent corroboration to adequately establish each CS's reliability and veracity.

Defendant also complains about hearsay information from other law enforcement officers besides Freeman in the affidavit. However, an affiant may rely upon hearsay information in order to set forth probable cause, provided the source of information is reliable. *Shamaeizadeh v. Cunigan*, 338 F.3d 535, 551 (6th Cir. 2003) ("An affidavit on which a search warrant is issued need not reflect direct personal observations of the affiant if the hearsay information is derived from a credible source."); *United States v. Helton*, 314 F.3d 812, 819 (6th Cir. 2002) ("in evaluating whether probable cause exists for issuing a search warrant, a judicial officer may rely on hearsay evidence.") It is well established that "observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." *United States v. Ventresca*, 380 U.S. 102, 111 (1965). The effectiveness of the affidavit is not diminished because Freeman uses hearsay information from other officers.

B. The Nexus Between the Residence and Criminal Activity

The defendant also attacks the affidavit on the ground that it fails to establish a sufficient nexus between alleged drug dealing and his residence, 1484 County Road 250, Niota, Tennessee, to justify issuance of a search warrant for his residence. The police had ample probable cause to believe defendant was dealing

in illegal drugs based on the two controlled buys. But whether there was probable cause to believe evidence of defendant's illegal drug activity would be found in the defendant's residence is another matter. "There must be a 'nexus between the place to be searched and the evidence to be sought.'" *Frazier*, 423 F.3d at 532 (quoting *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (en banc) (quotation omitted)). "'The critical element in a reasonable search is not that the owner of property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought.'" *Frazier*, 423 F.3d at 532 (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 556, (1978)).

Freeman states in his affidavit that a drug trafficker often hide drugs, money, guns, and other evidence of drug trafficking in his residence. Furthermore, Freeman avers that on September 27, 2005, agents saw the defendant arrive in his Cadillac at his residence, 1484 County Road 250, Niota, Tennessee, and park there for about three minutes shortly after the CS called to place an order for cocaine and shortly before the defendant left his residence to deliver the cocaine. Had the affidavit stated the defendant went inside his residence, for however brief a period of time, before driving to Athens for the drug deal, there would be no question that the affidavit supports probable cause to issue the search warrant. The defendant's entry into the house would have led to a reasonable inference that the defendant retrieved the cocaine for the drug transaction from the house. But the affidavit does not state that the defendant went inside the house on September 27, 2005. Thus

whether there is a sufficient nexus between drug activity and the residence to support probable cause is a much closer question.

There is a line of Sixth Circuit cases that indicates a law enforcement officer's knowledge that drug traffickers often store evidence of their crimes in their homes is sufficient information in an affidavit to establish a nexus between a drug trafficker and his home. In *United States v. Miggins*, 302 F.3d 384 (6th Cir. 2002), *cert denied*, 537 U.S. 1097 (2002), 537 U.S. 1130 (2003), 538 U.S. 971 (2003), the affidavit used to obtain the search warrant for the defendant's residence stated the following: an undercover officer delivered a package known to carry cocaine to a Cooper Terrace address. The defendant signed for the package and was then arrested. After he was arrested, a piece of paper was found in his pocket inscribed with the names of the addressee and sender of the package and the Cooper Terrace address. The defendant had been convicted on numerous drug charges in another state. The Sixth Circuit held the affidavit provided probable cause to search the defendant's apartment located at another address citing numerous cases from other circuits standing for the proposition that it is reasonable to believe a drug dealer will store evidence of his dealing at home even though no drug trafficking has been observed to occur there. *Miggins*, 302 F.3d at 393-94 (*see also* cases cited therein). In *United States v. Blair*, 214 F.3d 690, 696 (6th Cir.), *cert. denied*, 531 U.S. 880 (2000), the court held a search warrant was properly issued where the affiant stated it was his experience that drug traffickers stored evidence in their homes, and cooperating witnesses, whose reliability was verified, provided information that the

defendant had sold them drugs at locations other than the defendants' home. In *United States v. Jones*, 159 F.3d 969, 974-75 (6th Cir. 1998) the search warrant was upheld where there was no information in the affidavit that anyone observed or heard about drugs or drug sales in the defendant's home, but the affidavit did provide that at least two drug transactions with the defendant had been recorded using a confidential informant wearing a wire outside on the premises of the defendant's home. In *United States v. Caicedo*, 85 F.3d 1184, 1193 (6th Cir. 1996), the defendant was arrested after picking up a friend at the bus station who was carrying cocaine in his backpack. Upon his arrest, the defendant was evasive about his correct address. A search warrant for the defendant's residence was obtained on the basis of an affidavit explaining the defendant's arrest and his attempt to conceal his address and detailing the officer's experience and his knowledge that drug traffickers often keep items related to drug trafficking in the homes. The Sixth Circuit held the affidavit adequately established probable cause to search. *Id.* at 1193.

The undersigned believes these cases provide ample authority to conclude that the affidavit at issue, based on the totality of the circumstances, provides probable cause to search defendant Gunter's residence. There is one more case, however, that bears discussion and that, upon first glance, appears to require a different result.

In *United States v. Frazier*, 423 F.3d 526 (6th Cir. 2005), an ATF agent secured six (6) search warrants for various locations related to a large drug conspiracy. The sixth warrant was for a residence of the leader of

the conspiracy, Frazier. The probable cause supporting the issuance of the warrant consisted of two controlled buys of drugs by confidential sources from associates of Frazier at Frazier's residence located at 759 Culver Court. The controlled buys were recorded, but, significantly, the agent forgot to include this fact in his affidavit. He did orally mention this fact to the Magistrate. The affidavit in support of the search warrant also detailed that Frazier had been evicted from his residence on Culver Court, and the cleaning staff had found drugs in that residence. The search warrant authorized a search of Frazier's new residence on Jeffries Street. None of the buys were alleged to have taken place at Frazier's Jeffries Street address, and, in fact, it was not even alleged that Frazier himself sold the drugs to the confidential informant. *Id.* at 529. Moreover, the affidavit said nothing about the reliability of the confidential sources. The Sixth Circuit began its analysis with the rule that it is limited to the four corners of the affidavit in determining if there was probable cause to issue the search warrant. *Id.* at 531. The Court then held that because there were no averments in the affidavit about the informants' reliability and no corroboration of the information provided by the informants, the affidavit failed to set forth probable cause to search Frazier's new residence. *Id.* at 532. Rejecting the government's argument that the Court's previous decisions in *Miggins, Blair, Jones,* and *Caicedo* provided authority to find the affidavit in this case set forth probable cause, the *Frazier* Court stated:

> None of these cases, however, supports the proposition that the defendant's status as a drug dealer, standing alone, gives rise to a fair

> probability that drugs will be found in his home. Where, as here, the *warrant affidavit is based almost exclusively on the uncorroborated testimony of unproven confidential informants* (none of whom witnessed illegal activity on the premises of the proposed search), the allegation that the defendant is a drug dealer, without more, is insufficient to tie the alleged criminal activity to the defendant's residence.

Id. at 533 (emphasis added). The only way to reconcile the *Frazier* decision with those in *Miggins, Blair, Jones*, and *Caicedo* is to focus on the *Frazier* Court's concern that the *Frazier* "warrant affidavit [was] based almost exclusively on the uncorroborated testimony of unproven confidential informants." In *Miggins, Blair, Jones*, and *Caicedo*, as is true in the instant case, the underlying evidence of actual drug dealing on the part of the defendant was much stronger than "uncorroborated testimony of unproven confidential informants." While the informants in this case were "unproven" to the extent there were no statements in the affidavit that they had been used in the past and had been proven reliable, the information they provided was strongly corroborated. The Gunter affidavit detailed two controlled buys. Police observed the CS's and the defendant arrive at the meeting place and police actually heard the transactions as they were occurring.

The Fourth Amendment's requirement of probable cause for the issuance of a warrant is not to be applied according to a fixed and rigid formula. *Illinois v. Gates*, 462 U.S. 213, 230-32 (1983). "Probable cause is a fluid concept – turning on the assessment of probabilities in

particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 232. The question before the undersigned is whether, based upon the totality of the circumstances set forth in the affidavit and using a practical, common-sense approach, a fair probability existed that evidence of a crime would be found at Gunter's residence when the search warrant was executed. *Id.* at 238. I conclude Freeman had probable cause to search the defendant's house based on the two controlled purchases of drugs from the defendant, the fact that the defendant made a short stop at his residence immediately before the second drug transaction, and Freeman's training and experience that drug traffickers frequently hide evidence of their crimes in their homes.

C. The Good Faith Exception

Evidence obtained pursuant to a search warrant later determined deficient need not be excluded where the officer executing the warrant reasonably and in good faith relied on the search warrant. *United States v. Leon*, 468 U.S. 897, 905 (1984). "The 'good faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization. In making this determination, all of the circumstances may be considered.'" *Frazier*, 423 F.3d at 533 (quoting *Leon*, 468 U.S. at 922-23 n. 23) "[S]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the

search." *Frazier*, 423 F.3d at 533 (quoting *Leon*, 468 U.S. at 922 (internal quotations omitted)).

Leon's good faith exception does not apply in the following sets of circumstances: 1) the supporting affidavit contained knowing or reckless falsity; 2) the issuing magistrate wholly abandoned his or her judicial role; 3) the affidavit is "so lacking in probable cause as to render official belief in its existence entirely unreasonable;" or 4) the officer's reliance on the warrant was neither in good faith nor objectively reasonable. *Frazier*, 423 F.3d at 533 (citing *Leon*, 468 U.S. at 923).

The government raised the *Leon* good faith exception in its response to the defendant's motion to suppress. The defendant did not reply to the government's response. In anticipation of such a position, the defendant does appear to argue in his brief in support of his motion to suppress that the affidavit is so lacking in probable cause as to render official belief in its existence unreasonable. As it appears that basis is the only circumstance which might obviate application of the good faith exception in the instant case and it is the only circumstance which defendant has addressed, I will confine my analysis to that circumstance, *i.e.*, whether the affidavit is so lacking in probable cause as to render official belief in its existence unreasonable.

While the Sixth Circuit in *Frazier* concluded the affidavit in that case lacked probable cause to issue a search warrant for Frazier's house, the Court also concluded "the affidavit established a sufficiently strong nexus between Frazier's alleged drug dealing

and his home" to merit application of the *Leon* good faith exception. *Frazier*, 423 F.3d. at 536. As previously discussed, the evidence of probable cause to search as a whole is stronger in the *Gunter* affidavit than in the *Frazier* affidavit, and evidence of the nexus between the defendant's drug dealing and his residence is at least as strong in this case as it is in *Frazier*. Accordingly, I conclude that if Agent Freeman's affidavit fails to provide probable cause to search defendant Gunter's residence, the *Leon* good faith exception to the exclusionary rule applies.

D. Defendant's Request for an Evidentiary Hearing

Franks v. Delaware, 438 U.S. 154, 171 (1978) established the procedure by which a defendant could seek the suppression of evidence by challenging the veracity of statements made by an affiant in order to secure a search warrant. "Counsel can attack the validity of a search warrant by alleging that the affidavit contains deliberately false statements." *United States v. Hill*, 142 F.3d 305, 309 (6th Cir.), *cert. denied*, 525 U.S. 898 (1998) (citing *Franks v. Delaware*, 438 U.S. 154, 171 (1978). To do so requires an evidentiary hearing during which defendants are allowed to present evidence concerning the veracity of the challenged statements in the search warrant affidavit. *See United States v. Jenkins*, 728 F.2d 396, 397 (6th Cir. 1984). "In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search

excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Franks*, 438 U.S. at 155-56 (1978). In order to obtain a hearing to establish perjury or reckless disregard for the truth, the defendant must meet a two-pronged test: "First, a defendant must make a substantial preliminary showing that specified portions of the affiant's averments are deliberately or recklessly false." *Hill*, 142 F.3d at 310 (internal citations omitted). Second, the court must find that the challenged statements are necessary to a finding of probable cause. *Id.* Significantly, the *Franks* Court emphasized that only the affiant's statements, not those of a non-governmental informant, may be challenged as deliberately false or made in reckless disregard for the truth. *Franks*, 438 U.S. at 171.

Franks v. Delaware does not provide for a hearing to conduct a fishing expedition on the credibility of an affiant. Instead, the undersigned must follow the framework established by *Franks v. Delaware*. Because the defendant has not made a substantial preliminary showing, in the form of an affidavit or otherwise, of reckless or deliberate disregard for the truth on the part of Agent Freeman who prepared the affidavit to secure the search warrant, defendant is not entitled to an evidentiary hearing.

IV. Conclusion

When considering the information presented in Agent Freeman's affidavit as a whole, I conclude the affidavit sets forth probable cause to issue the search warrant for the defendant's residence. In the alternative, I conclude the *Leon* good faith exception

applies, and evidence obtained in the September 28, 2005, search of Gunter's residence need not be suppressed. Finally, defendant has not made a substantial preliminary showing of a reckless or intentional disregard for the truth on the part of Agent Freeman in his affidavit to merit an evidentiary hearing on defendant's motion to suppress. Therefore, it is RECOMMENDED that defendant's motion to suppress (Doc. 15) be DENIED in fill.[2]

s/William B. Mitchell Carter
UNITED STATES MAGISTRATE JUDGE

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[2] Any objections to this Report and Recommendation must be served and filed within ten (10) days after service of a copy of this recommended disposition on the objecting party. Such objections must conform to the requirements of Rule 72(b) of the Federal Rules of Civil Procedure. Failure to file objections within the time specified waives the right to appeal the District Court's order. *Thomas v. Arn*, 474 U.S. 140, 88 L.Ed.2d 435, 106 S.Ct. 466 (1985). The district court need not provide *de novo* review where objections to this report and recommendation are frivolous, conclusive or general. *Mira v. Marshall*, 806 F.2d 636 (6th Cir. 1986). Only specific objections are reserved for appellate review. *Smith v. Detroit Federation of Teachers*, 829 F.2d 1370 (6th Cir. 1987).